IN THE SUPREME COURT OF MISSISSIPPI

No. 2011-CA-00732

JONATHAN P. O'BRIANT

Appellant

vs.

OLIVIA A. O'BRIANT

Appellee

On Appeal from the Chancery Court of Madison County, Mississippi

REPLY BRIEF OF APPELLANT JONATHAN P. O'BRIANT

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REBUTTAL ARGUMENT

Olivia attempts to persuade this Court that the Chancery Court properly applied the *Albright* factors, however their arguments lack specificity and a reasonable basis in law or the record of evidence. *See Albright v. Albright*, 437 So. 2d 1003, 1005 (Miss. 1983); *Sellers v. Sellers*, 638 So. 2d 481, 485 (Miss. 1994). Further, Olivia *incorrectly* argues that the newly discovered evidence concerning circumstances of the minor child which occurred well *after* the trial, are not "new" and should not be presented at a hearing. *Appellee's Brief* at 20-21. However, to further this argument Olivia solely relies on an affidavit from August 2009, nearly one year prior to the parties being divorced. (R.E. 4); *Appellee's Brief* at 22.

As reiterated below, the Chancery Court recast the *Albright* factors and reached the ultimate custody decision that is not supported by the record of evidence. *Lawrence v. Lawrence*, 956 So. 2d 251, 263 (Miss. Ct. App. 2006). Further, this Court should find that Jonathan has met all the required elements necessary for a new trial to present newly discovered evidence, and thus, the Chancery Court abused its discretion by denying Jonathan's requests for rehearing. *Hollon v. Hollon*, 784 So. 2d 943, 946 (Miss. 2001); *see also Wade v. Wade*, 967 So. 2d 682, 684 (Miss. Ct. App. 2007). For the reasons stated herein, this Court should find that the Chancellor committed reversible error and remand this case to the Chancery Court for a new trial, where a proper analysis of the *Albright* factors shall take place. *Id.*

I. The Chancery Court recast the *Albright* factors and reached a conclusion lacking an evidentiary basis, and thus, erred in awarding custody of the minor child to Olivia.

In determining whether the Chancellor improperly applied the *Albright* factors, all testimony and evidence presented at trial under each factor should be reviewed. *See*

Watts v. Watts, 854 So. 2d 11, 13 (Miss. Ct. App. 2003). Although Olivia's brief fails to prove otherwise, the Chancery Court misapplied the *Albright* factors regarding the stability of the home environment and employment of each parent; the continuity of care; parenting skills; the willingness and capacity to provide primary child care; and physical and mental health of each parent, and as a result, reached a conclusion unsupported by the record of evidence. *Albright*, 437 So. 2d at 1005; (R.E. 3-13); *Appellee's Brief* at 10. Due to the Chancery Court's improper consideration of the evidence actually presented in this case and subsequent erroneous application of the *Albright* factors, this Court should find that the Chancellor committed reversible error and remand this case to Chancery Court for a new trial, where the Chancery Court shall conduct a proper analysis of the *Albright* factors. *Lawrence*, 956 So. 2d at 263; *Hollon*, 784 So. 2d at 946. As such a discussion of these factors is stated below.

A. The Chancery Court Improperly Analyzed the Stability of the Home Environment and Employment of Each Parent

In her brief, Olivia repeatedly suggests that Jonathan's "real qualm" is with the Chancellor's credibility determinations of his mother's and his own testimony at the hearing. *Appellee's Brief* at 9. However, Olivia fails to identify any particular examples to further such argument, which in actuality is no more than an accusation without any basis. *Appellee's Brief* at 9.

The Chancery Court's improper application of the *Albright* factors begins with its recasting of the stability of home environment and employment of each parent. (R.E. 6, 8-9); *Albright*, 437 So. 2d at 1005. The Chancery Court analyzed the parties' employment responsibilities and stabilities of employment and provided a separate

analysis of their stability of home environment; however, it failed to provide any analysis of the "employment of each parent" and as a result, Jonathan was prejudiced. *Sellers,* 638 So. 2d at 485. By removing the subpart "employment of each parent" out of *Albright's* "stability of home environment and employment of each parent" factor, the Chancery Court found that such factor favored neither parent. If the Chancery Court had properly applied the legal standard as enumerated in *Albright,* which allows for the analysis of "the employment of the parent and responsibilities of that employment" and "the stability of home environment and employment of each parent," then this factor should have been found to favor Jonathan. *Albright,* 437 So. 2d at 1004-05; (R.E. 6-9).

The Chancery Court correctly found that Jonathan's employment is more stable with his flexible schedule, lack of travel requirements and adequate compensation. (R.E. 6). Thus, by recasting the *Albright* factors to remove "the employment of each parent" from the "stability of home environment" analysis, the Chancery Court prevented Jonathan from reaping the full benefit of having a steady and flexible employment position. *See Sellers,* 638 So. 2d at 485; (R.E. 6). Therefore, when the Chancery Court analyzed the stability of the home environment without considering the employment of each parent, it improperly applied the *Albright* factors and reached a wrong conclusion. See *Lawrence,* 956 So. 2d at 258-63; *Hollon,* 784 So. 2d at 946; (R.E. 6-9).

In her brief, Olivia fails to cite any legitimate proof that the Chancery Court did in fact properly apply and consider the correct legal standard to determine the best interests of the minor child. *See Smith v. Smith,* 614 So. 2d 394, 397 (Miss. 1993); *Woodham v. Woodham,* 17 So. 3d 153, 158; *Appellee's Brief* at 10. In *Woodham,* the Court did not find that the lower court improperly applied the *Albright* factors because

although the "stability of home environment" was analyzed separately from the "employment of each parent," the lower court also conducted a separate analysis of the "employment of the parents and responsibilities of the employment." *Woodham*, 17 So. 3d at 157-58; *see also Sellers*, 638 So. 2d at 485. Contrary to the present case, where the Chancery Court removed and failed to provide any analysis regarding the subpart "employment of each parent" from the "stability of home environment" factor, the Chancery Court in *Woodham* put forth its analysis for each factor, including each subpart. 17 So. 3d at 157-58; (R.E. 6-9).

Olivia did correctly state that in *Benal v. Benal*, the Chancery Court applied the same erroneous standard as exhibited in the present case, but that should be of no coincidence.[1] 22 So. 3d 369, 376 (Miss. Ct. App. 2009); *Appellee's Brief* at 10. As in the present case, the Chancery Court in *Benal* removed the subpart "employment of each parent" from its "stability of home environment," but again failed to provide additional analysis regarding each parent's employment. 22 So. 3d at 376; (R.E. 6-9). Moreover, in *Benal*, the Appellant was not arguing that the Chancery Court applied an improper legal standard as in the present case, but instead that the lower court erred in finding his "ties to the community were minimal." 22 So. 3d at 376.

Further, the *Benal* Court found that both parents were on equal footing regarding their employment, but in the present case, the Chancery Court found that Jonathan's employment was more stable with his flexible schedule, lack of travel requirements and adequate compensation. *Id.*; (R.E. 6). Therefore, Jonathan failed to receive the complete benefit of having favorable employment conditions simply because the

1 As in the present case, the appeal in *Benal v. Benal* stems from the ruling of the Honorable Cynthia Brewer of the Madison County Chancery Court, Mississippi. 22 So. 3d 369 (Miss. Ct. App. 2009).

Chancery Court recast the *Albright* factors in a way that removed the "employment of each parent" from its "stability of home environment" analysis. (R.E. 6-9). As Olivia correctly notes in her brief, the *Albright* analysis is not a matter of mathematics but of a proper analysis of each factor under the legal standard so the correct conclusion may be drawn. *See Curry v. McDaniel*, 37 So. 3d 1225, 1234 (Miss. Ct. App. 2010).

In a desperate attempt to distract the Court from focusing on the real issue at hand, Olivia carelessly alleges that the Mississippi Rules of Appellate Procedure were not followed. *See* MISS. R. CIV. P. 28(a)(6); *Appellee's Brief* at 10. Jonathan will not waste any time on such accusations and affirmatively states that they are false and without any real basis, because in fact, Jonathan presents not one but four cases to the Court in support of his argument concerning the Chancery Court's recast of the *Albright* factors. MISS. R. CIV. P. 28(a)(6); *Appellee's Brief* at 10.[2]

As stated above, the Chancery Court applied an erroneous legal standard when it recast two of the *Albright* factors in an unauthorized manner under Mississippi law, and as a result, reached an improper conclusion. (R.E. 6-9); *see Lawrence*, 956 So. 2d at 258-62; *Hollon*, 784 So. 2d at 946. Subsequent to Jonathan's request, the Chancery Court failed to address its misapplication as requested in Jonathan's timely Motion, and thus, committed reversible error. (R.E. 15, 41).

B. The Chancery Court Failed to Conclude That Both Parents Provided Continuous Care for Maguire

In reaching its decision to award Olivia custody of Maguire, the Chancery Court

2 Contrary to what is alleged in Olivia's brief, Jonathan did in fact cite the following four cases in support of his argument concerning the Chancery Court's recast of the *Albright* factors: *Sellers v. Sellers*, 638 So. 2d 481 (Miss. 1994); *Smullins v. Smullins*, No. 2009-CA-00994-COA (Miss. Ct. App. 2011); *Woodham v. Woodham*, 17 So. 3d 153 (Miss. Ct. App. 2009); *Hollon v. Hollon*, 784 So. 2d 943 (Miss. 2001). *Appellant's Initial Brief* at 12-14.

found that prior to the separation, Jonathan primarily worked outside the home or pursued his studies for medical school. (R.E. 5). But, there is no evidence in the record to support this conclusion. (R.E. 19). In fact, prior to the trial Jonathan and Olivia spent approximately the same amount of time at home with Maguire as illustrated in the table described in Jonathan's Motion for Rehearing and to Alter and Amend Judgment. (R.E. 19). Moreover, Mississippi courts have held that the Chancellor's weighing of certain *Albright* factors not supported by the record of evidence is reversible error. *Lawrence*, 956 So. 2d at 263.

Although Olivia fails to mention in her brief, both parties testified that the other was significantly involved in Maguire's rearing, but each claimed to be the parent who primarily cared for Maguire. (Trial Tr. 73, 162). Further, Olivia fails to acknowledge the that the Chancery Court's brief analysis of this factor is inconsistent with the actual testimony of herself, Ann and Jonathan presented at trial concerning Jonathan's cooking, playing, bathing, changing and caring for his medical needs of his son on a daily basis. *Appellee's Brief* at 12-13; (Trial Tr. 60-62, 273.) The Chancery Court found that Jonathan "did assist with bathing and some doctor's visits" and ignored Olivia's testimony that Jonathan took good care of Maguire's daily needs, especially his medical needs. (R.E. 5); (Trial Tr. 241). Nevertheless, the Chancery Court's judgment failed to find that Jonathan continuously cared for Maguire before and after the parties' separation, even during the months while Olivia was enrolled in school. (R.E. 5, 19).

In *Caswell v. Caswell*, the Mississippi Court of Appeals held that a Chancellor must consider the continuity of care prior to and *after* the parties' separation. 763 So. 2d 890, 893 (Miss. Ct. App. 2000). Similarly in the present case, the Chancellor failed to

consider Jonathan's continuity of care for the minor child *after* the parties separated. *Id.* In fact, the Chancery Court seemed to ignore its determination to award Jonathan sole temporary physical custody of Maguire in October 2009. (R.E. 4). Notably, during such custodial period, no issues were raised regarding Jonathan's ability to continually care and provide for the minor child. (R.E. 4). Therefore, the Chancery Court's analysis under this factor failed to consider the provided continuity of care for the minor child *after* the parties' separation, including Jonathan's temporary custodial period, and as a result, reached a conclusion that conflicts with the substantial weight of the evidence. *Caswell*, 763 So. 2d at 893; *see also Lawrence*, 956 So. 2d at 258-59.

C. The Chancery Court Improperly Analyzed Parenting Skills Factor

In Jonathan's initial Motion for rehearing, he requested the Chancery Court to reconsider its inaccurate analysis of the parties' parenting skills. (R.E. 14-26); *Sellers*, 638 So. 2d at 485; *see also Lawrence*, 956 So. 2d at 259. In its Opinion, the Chancery Court improperly concluded that Olivia had more time to develop her parenting skills prior to the separation and that Jonathan relied heavily on his mother as a caretaker since the separation. (R.E. 5-6). However, this conclusion is inaccurate for two reasons, despite Olivia's attempt to convince the Court otherwise, which falls short of persuasive. *Appellee's Brief* at 14-15.

First, the Chancery Court ignored the extensive evidence in favor of Jonathan's parenting skills. Once again the Chancellor fails to consider its determination to award Jonathan sole temporary physical custody of Maguire back in October 2009. (R.E. 4). Unlike Olivia, during such custodial period Jonathan had nearly one year to develop his parenting skills. (R.E. 4, 6-13). Further, testimony at trial revealed that Jonathan

provided for the minor child's needs on a daily basis and spent an equal amount of time with the minor child. (Trial Tr. 60-62). In her brief, Olivia fails to prove that she had more time to develop her parenting skills prior to the custody determination. *Appellee's Brief* at 14-15. This is because there is no evidence in the record of such. As stated above, Jonathan and Olivia spent approximately the same amount of time at home with Maguire, prior to the separation, as illustrated in the table contained in his initial request for rehearing. (R.E. 19). For thirteen months, Jonathan and Olivia did not work or study outside of the home; for six months, Jonathan worked while Olivia stayed home; and for five months, Olivia went to school while Jonathan stayed home. (R.E. 19). Therefore, the Chancery Court's analysis under this factor completely contradicts the substantial weight of the evidence and the Chancellor's previous findings. (R.E. 4-6).

Second, the Chancellor fails to recognize the numerous uncontested examples of Olivia's poor parenting skills. *Appellee's Brief* at 14-15; (Trial Tr. 232-240). At the hearing, Olivia admitted to (i) not returning home from Texas when Maguire had pneumonia; (ii) not intending to enroll Maguire in speech therapy, even after his speech impediment was identified by a professional; (iii) Maguire's ear infections worsening on her watch; (iv) recommending an unproven "garlic water" remedy; and worst of all (v) intentionally withholding Maguire from Jonathan. (Trial Tr. 232-240). Contrary to what is argued in Olivia's brief, these are not issues of the credibility of witnesses, but are glaring examples admitted to by Olivia. (Trial Tr. 232-240). Again, the Chancery Court reached a conclusion conflicting with substantial weight of the evidence presented, and therefore is in error. *See Lawrence*, 956 So. 2d at 263; *Hollon*, 784 So. 2d at 952; *Caswell*, 763 So. 2d at 893.

In her brief, Olivia attempts to push her credibility argument forward, but simply ignores the record of evidence. *Appellee's Brief* at 15. Jonathan's mother testified that she picks up Maguire from daycare and that Jonathan comes to pick him up after work. *Appellee's Brief* at 15; (Trial Tr. 60-62, 73, 273, 287, 291, 310). Jonathan's mother also testified that at times Maguire's toothbrush and medicine are kept at her house, but that Jonathan plays, bathes and puts Maguire to sleep at his house every night. (Trial Tr. 60-62, 73, 273, 287, 291, 310). The record is clear, while in his custody, Jonathan is the primary caregiver of his son and his mother only assists while he is at work. (Trial Tr. 60-62, 273, 310), (R.E. 6). Therefore, it is clear that the Chancery Court's analysis under this factor completely contradicts the substantial weight of the evidence as well as the Chancellor's previous findings, and thus is in error. (R.E. 4-6); *see Lawrence*, 956 So. 2d at 263; *see also Hollon*, 784 So. 2d at 952; *Caswell*, 763 So. 2d at 893.

D. The Chancery Court Ignored the Evidence of Jonathan's Willingness and Capacity to Provide Primary Child Care

In a very brief analysis, the Chancery Court stated that it was apparent from Jonathan's and his mother Ann's testimony, that Jonathan has limited experience as the primary caregiver of Maguire and that his mother clearly assumes that role. (R.E. 6). However, this completely contradicts the actual testimony of Jonathan and Ann at trial, as well as the Chancery Court's previous determination to award sole temporary physical custody of Maguire to Jonathan in October 2009. (R.E. 4); (Trial Tr. 60-62, 73, 273, 287, 291). Both Jonathan and Ann testified that Jonathan is the primary caregiver of Maguire while Ann only assists during his time at work. (Trial Tr. 60-62, 273), (R.E. 6). The actual testimony reveals that when Jonathan arrives home around 4:45 p.m., he is completely

hands on with Maguire and takes care of his needs, including feeding, bathing, and changing on a daily basis. (Trial Tr. 60-62, 273). Jonathan's desire to care for his son has never been questioned, as he explained at the hearing, "I cannot imagine my life without Maguire. I want custody of Maguire." (Trial Tr. 73).

Again, Olivia attempts to mislead this Court of Ann's true role with the minor child by stating that the minor child's toothbrush and medication are kept at her house, when both Ann and Jonathan consistently testified that it is only *sometimes* kept at her house, but that every night Jonathan plays, bathes and puts Maguire to sleep at his house. *Appellee's Brief* at 16-17; (Trial Tr. 60-62, 73, 273, 287, 291, 310). Once again, the Chancery Court completely ignores the fact that it had previously awarded temporary custody to Jonathan based on its finding that it was in Maguire's best interest and that Jonathan was fully capable of caring for his son. (R.E. 4). Thus, the Chancery Court erred in finding that this factor favored Olivia for such conclusion was clearly not based on substantial evidence.

E. Age, Physical and Mental Health of Each Parent

In her brief, Olivia falsely states that Chancery Court found that this factor slightly favored her due to Jonathan's history of mental "illness." *Appellee's Brief* at 17-18. Such statement is clearly inappropriate as nowhere in the Chancery Court's Opinion does it mention a finding of a mental "illness" nor was any evidence introduced by Olivia to prove such. *Appellee's Brief* at 17-18; (R.E.7). Olivia had the opportunity, but chose not to put on expert testimony or request Jonathan to participate in an independent exam or even request a guardian ad litem to investigate. Most importantly, it cannot be shown that there is a single piece of demonstrative evidence indicating Jonathan's mental

health had any adverse impact on Maguire. *McGraw v. McGraw*, 841 So. 2d 1181, 1184 (Miss. Ct. App. 2003). Jonathan had sole temporary custody of Maguire at the time of the final hearing, and during such period, not one time did the issue of Jonathan's mental health arise. (R.E. 4). Instead, Jonathan proved that he was capable and willing to be the sole custodial parent of Maguire. (Trial Tr. 73).

Although Olivia fails to acknowledge in her brief, this Court has held that a prior commitment to a mental facility for depression should not weigh against a parent who has recovered. *McGraw*, 841 So. 2d at 1184; *Appellee's Brief* at 18. In *McGraw*, at the time of trial the mother was no longer taking medication for her condition. *McGraw*, 841 So. 2d at 1184; *Appellee's Brief* at 18. However, the *McGraw* Court does not disguise that its conclusion was heavily based on the absence of evidence in the record indicating that the mother was "physically or emotionally incapable of providing the primary care, custody, and control of the children." *841 So. 2d at 1184.* Further, despite her previous commitment, the *McGraw* Court concluded that it was in the best interests of the children to remain with their mother. *Id.*

Similarly, in the present case there is nothing in the record to indicate that Jonathan is not physically or emotionally incapable of providing primary care to Maguire; and therefore, the Chancery Court improperly analyzed this factor against him by weighing too heavily on the evidence of Jonathan's temporary stay at Whitfield nearly ten years before the trial took place and well before the parties were even married. (RE. 7). *See Passmore v. Passmore*, 820 So. 2d 747, 751 (Miss. Ct. App. 2002); (R.E. 3).

In sum, by improperly applying and considering the *Albright* factors, the Chancery Court awarded Olivia sole physical custody of Maguire and drew a manifestly

wrong conclusion, which lacked an evidentiary basis. *Lawrence*, 956 So. 2d at 258-63; *see Albright*, 437 So. 2d at 1005; *see also Hollon*, 784 So. 2d at 946; (R.E. 3-13). Therefore, this Court should find the Chancellor committed reversible error and remand this case to Chancery Court for a new trial, where a new analysis of the *Albright* factors shall be conducted.

II. The Chancery Court erred by denying Jonathan's request for rehearing and to present newly discovered evidence concerning the polestar consideration of the custody determination.

In the present case, the Chancery Court erred in denying Jonathan's Motion for Rehearing and to Alter and Amend Judgment, Supplemental Motion for Rehearing and to Alter and Amend Judgment and Second Supplemental Motion for Rehearing and to Alter and Amend Judgment to allow newly discovered evidence to be introduced at a new trial in the best interest of the minor child. MISS. R. CIV. P. 28; *see Wade v. Wade*, 967 So. 2d 682, 684 (Miss. Ct. App. 2007). Although Olivia would disagree, the Chancery Court provided no explanation for the dismissal of Jonathan's request for rehearing, which is another ground for remand as this Court has previously held. *See Chroniger v. Chroniger*, 914 So. 2d 311, 316; (R.E. 41); *Appellee's Brief* at 22.

Jonathan's motions for rehearing addressed several specific actions and omissions on the part of Olivia, which concerned the best interests of the minor child, as well as requested certain alternative relief. (R.E. 27-40). However, the Chancery Court failed to address any of Jonathan's concerns nor the alternative relief requested in its broad denial, which cannot be held to be in the minor child's best interest. (R.E. 41); *Chroniger*, 914 So. 2d at 316. Further, Olivia claims that Jonathan's reliance on *Chroniger* is "misplaced" despite the Court's reversal of the lower court's ruling because

it provided no explanation and no determination regarding the minor child's best interests, just as in the present case. 914 So. 2d at 316; *Appellee's Brief* at 20; (R.E. 41).

Therefore, due to the Chancery Court's error in denying Jonathan's request for rehearing and to introduce newly discovered evidence not available at trial, this Court should reverse the Chancery Court's decision and remand this case for a new trial, where the Chancery Court shall conduct a new *Albright* analysis using the appropriate legal standard. (R.E. 41). *See Wade,* 967 So. 2d at 684-85; *see also Hollon,* 784 So. 2d at 946; *Lawrence,* 956 So. 2d at 258-63; *J.P.M. v. T.D.M.,* 932 So.2d 760, 770 (Miss. 2006) (*citing Powell v. Ayars,* 792 So. 2d 240, 244)(Miss. 2001)).

A. New Evidence Discovered After The Hearing

Jonathan timely requested a rehearing on the basis of newly discovered evidence not previously available at the hearing. MISS. R. CIV. P. 28; (R.E. 27-40). Although Olivia fails to fully acknowledge such newly discovered evidence was presented in the form of Jonathan's phone record log, his sworn affidavit and testimony illustrating Olivia's inattention and lack of discretion with regard to Maguire's significant health concern, and her non-compliant attitude to follow the Chancery Court's order. *Appellee's Brief* at 20-21; (R.E. 9-13, 27-40).

Contrary to what Olivia attempts to persuade this Court, similar issues previously heard by the Chancery Court does not preclude presenting newly discovered evidence regarding events that occurred *after* the hearing. *Appellee's Brief* at 22; *see also Wade,* 967 So. 2d at 684-85. In her brief, Olivia embarrassingly attempts to argue that such evidence is not "new" because Jonathan stated in his affidavit dated August 31, 2009 that "I have repeatedly called my wife's cell phone and her father's home telephone number,

but I have not received an answer." *Appellee's Brief* at 22. Further, in her brief, Olivia appears to admit that she does in fact impede Jonathan's access to his son while in her custody. *Appellee's Brief* at 22-23. Moreover, such affidavit was in fact submitted in support of Jonathan's Emergency Temporary Restraining Order filed on September 1, 2009, for which the Chancery Court found that it was in the best interests of the minor child to award Jonathan temporary sole physical custody. (R.E. 4); *Appellee's Brief* at 22. Such affidavit concerned events that occurred over a year before the parties were divorced, and thus, fails to provide any support to Olivia's desperate plea. (R.E. 4); *Appellee's Brief* at 22. Moreover, the newly discovered evidence strictly includes Olivia's willful actions and omissions involving the minor child which occurred well after the hearing. (R.E. 27-40).

In Jonathan's request for rehearing, he stated that since the hearing on more than 27 separate recorded occasions, Jonathan called Olivia's or her family member's telephone attempting to exercise his telephonic visitation with Maguire and was unsuccessful due to Olivia's deliberate interference. (R.E. 29-33). That number has now multiplied. (R.E. 27-34). Olivia's conduct is directly in violation of the Chancery Court's order to allow Jonathan fifteen minutes of telephonic visitation with Maguire while he is in Olivia's custody. (R.E. 10). Jonathan would show the Chancery Court that in reference to the telephonic visitation issue, Olivia stated that Jonathan should buy Maguire an iPhone if he wants to talk to his son, which is nothing more than a pure example of her immaturity and refusal to co-parent with Jonathan (O. A. Tr. 374.).[3]

[3] "O. A. Tr." refers to the transcript of the oral argument before the Chancery Court on March 23, 2011 on Jonathan's Motion for Rehearing and to Alter and Amend Judgment and Supplemental Motion for Rehearing and to Alter and Amend Judgment.

Further, in his sworn affidavit, Jonathan stated that he was concerned about the "physical wellbeing of Maguire." (R.E. 39). If granted the opportunity, Jonathan would present newly discovered evidence to show that Olivia continuously fails to acknowledge and respond to Maguire's severe health issues. (R.E. 27). Olivia has firsthand knowledge of Maguire's significant health concerns but continuously refuses to respond to them as a reasonable parent would. (Trial Tr. 232-240); (R.E. 27-40). However, such newly discovered evidence concerns Olivia's blatant lack of concern and inability to recognize his medical needs which occurred after the hearing; and therefore, has not been presented to the Chancery Court. (R.E. 27-40). Because the minor child's needs are not adequately cared for by Olivia in Texas, Jonathan took Maguire to his local doctors for his upper respiratory infections, sinus infection, ear infections, placement of new tubes in his ears, a micro laryngoscopy to examine his larynx and a severely infected ingrown toenail, which all occurred after the hearing. (R.E. 27, 39).

Nevertheless, had Olivia taken reasonable precaution when Maguire was in her care, such diagnoses could have been prevented. (R.E. 27, 39). It is remarkable to note that at the time of the appeal, Olivia still had not even requested Maguire's medical records to be reviewed by a doctor(s) in Texas, despite her knowledge of the minor child's significant medical concerns. (R.E. 27-40). Instead of recognizing her own fault, Olivia blames Jonathan and the state of Mississippi for Maguire's sickness as stated in her text message to Jonathan that "...hopefully the doctors will find out why he keeps getting sick in Mississippi." (R.E. 30).

Although Olivia fails to mention that since the hearing, she has in fact increased Maguire's time at the daycare, despite her testimony, as relied upon by the Chancery

Court, that Maguire would be watched at home by her family members. (Trial Tr. 184); *Appellee's Brief* at 21-23. Evidence was presented that if Maguire was in Jonathan's custody, Maguire would be cared for by Jonathan's mother while he was at work. (Trial Tr. 273). In addition, Olivia has not started attending nursing school as the Chancery Court was also led to believe would starting in January of last year. (Trial Tr. 160). This is just another of many examples of Olivia leading the Court to believe one thing and doing the opposite. (R.E. 27-40). Therefore, Jonathan has met his burden to show the newly discovered evidence was not available at the hearing. *See Wade,* 967 So. 2d at 684; *see also Logan v. Logan,* 730 So. 2d 1124, 1126 (Miss. 1998).

B. Jonathan Used Due Diligence to Discover New Evidence

Jonathan was diligent in his efforts to discover the new evidence as discussed above. *See Wade,* 967 So. 2d at 684-85. The newly discovered evidence surrounds events that occurred after the hearing, and thus could have only been discovered after such. *Id.* Therefore, Jonathan's due diligence to discover the newly discovered evidence should be inferred. *See Wade,* 967 So. 2d at 684. In addition, Olivia admits in her brief that she does not have proof that Jonathan failed to use diligent efforts. *Appellee's Brief* at 23. Thus, Jonathan has met his burden of proof that he did use due diligence to discover the new evidence. *See Wade,* 967 So. 2d at 684.

C. Newly Discovered Evidence is Material to the Chancery Court's Custody Determination as it Concerns the Polestar Consideration

This newly discovered evidence is material because it goes directly to the best interest of the minor child, which is the polestar consideration in a custody determination. *Sellers,* 638 So. 2d at 485; *see Wade,* 967 So. 2d at 684-85. Olivia

attempts to downplay her continuous behavior to prevent Jonathan from having a meaningful relationship with Maguire and her inability to care for his significant medical needs. *Appellee's Brief* at 22-24. However, the newly discovered evidence concerns Olivia's willingness and capacity to care for the minor child, including his medical needs, and thus, aims at the heart of the polestar consideration in a custody determination. *See Sellers*, 638 So. 2d at 485; (R.E. 27-40). Moreover, the newly discovered evidence supports a finding that Olivia is not the proper custodial parent and that awarding Jonathan primary physical custody is in the best interests of Maguire. *Sellers*, 638 So. 2d at 485; *see Logan*, 730 So. 2d at 1125-26. Further, Jonathan has met his burden to show that such evidence is not impeaching or cumulative in nature, but is in fact material to the Chancellor's determination of custody and analysis of the *Albright* factors. *Id.*

D. If the Court Should Grant a New Trial, a New Decision Would Result

If Jonathan were granted the opportunity to present the newly discovered evidence at a new hearing, the Chancery Court would undoubtedly reach a new result in their analysis of the *Albright* factors and award Jonathan primary custody of Maguire. *See January v. Barnes*, 621 So. 2d 915, 920 (Miss. 1992); *see also Sellers*, 638 So. 2d at 485.

Contrary to what Olivia attempts to argue, the newly discovered evidence demonstrates her lack of parenting skills and willingness and capacity to care for Maguire. (R.E. 27-40); *Appellee's Brief* at 21-22. The newly discovered evidence also shows Olivia's unwillingness to co-parent with Jonathan and her intentional interference with his pursuit of nurturing a healthy relationship with Maguire. (R.E.

27-40). More importantly, this Court should note that upon Jonathan's request for rehearing, the Chancery Court was in a position to compare the custodial periods of the parties, which it failed to do. (R.E. 41). In October 2009, the Chancery Court awarded Jonathan sole temporary physical custody of Maguire. (R.E. 4). During this time, Jonathan exhibited the capacity, willingness, skills and desire necessary to provide primary care for his son on a permanent basis. (R.E. 4). Not one time did Olivia question his ability to care and provide for Maguire during this custodial period. (R.E. 4). However, since Olivia was awarded primary custody of Maguire in October 2010, Jonathan has raised several legitimate concerns regarding her ability to care and provide for Maguire's needs, especially his medical needs. (R.E. 27-40). Although Olivia fails to rebut such argument with sufficient support, this Court should find that Jonathan has met his burden of proof to show that if given the opportunity to present such newly discovered evidence, a new decision regarding the custody of Maguire would in fact result. *See January v. Barnes*, 621 So. 2d at 920; (R.E. 27-40); *Appellee's Brief* at 24.

As previously mentioned, with a proper analysis of the *Albright* factors, the Chancery Court would reach the following conclusion regarding the *Albright* factors: the age, health and sex of the child is neutral; continuity of care prior to the separation is neutral; best parenting skills favors Jonathan; willingness and capacity to provide primary child care favors Jonathan; the employment of the parent and responsibilities of that employment favors Jonathan; age, physical and mental health and age of the parents favors neither party; emotional ties of parent and child favors neither parent; moral fitness of parents favors neither party; the home, school and community record of

the child favors Jonathan; the preference of the child at the age sufficient to express a preference by law is not applicable; stability of home environment and employment of each parent favors Jonathan; and other factors relevant to the parent-child relationship favors neither party. *See Sellers*, 638 So. 2d at 485; *Hollon*, 784 So. 2d at 946. Thus, if Jonathan was granted a new trial, the newly discovered evidence would be material to the Chancery Court's *Albright* analysis and would produce a new result in awarding Jonathan primary physical custody of Maguire. *Sellers*, 638 So. 2d at 485.

Therefore, this Court should find that the Chancery Court abused her discretion because Jonathan has proved all the necessary elements for a new trial, and further, should find that the Chancellor committed reversible error and remand this case to Chancery Court for a new trial, where the Chancery Court shall conduct a new analysis of the *Albright* factors applying the proper legal standard. *Wade,* 967 So. 2d at 684.

CONCLUSION

In conclusion, this appeal stems from the manifestly wrong custody determination of an honorable Chancellor with vast experience and ability in her application of the law and analysis. However, in this case, the Chancellor failed to reconsider her erroneous application of the *Albright* factors and her conclusion lacking an evidentiary basis in the record. In her brief, Olivia fails to provide demonstrative evidence to rebut Jonathan's argument that the Chancellor recast the *Albright* factors and applied an erroneous legal standard, and as a result reached a manifestly wrong conclusion. Further, the Chancery Court denied Jonathan the opportunity to present newly discovered evidence not available at the trial aiming at the heart of the Chancellor's decision to award Olivia custody of Maguire in his best interest, and did so

without providing a single explanation for her denial despite the fact that very specific issues were raised by Jonathan. Olivia attempts to convince this Court that the evidence of events occurring well after the hearing are not "new" by solely relying Jonathan's August 2009 affidavit, which is less than sufficient proof. If the Chancery Court would have granted a rehearing and conducted a new analysis of the *Albright* factors applying the proper legal standard, then it would determine that it is in Maguire's best interest to award Jonathan custody. For the reasons stated herein, this Court should find that the Chancellor committed reversible error and remand this case to the Chancery Court for a new trial, where a new analysis of the *Albright* factors using the appropriate legal standard shall take place.

Respectfully submitted this, the 21st day of February, 2012.

JONATHAN P. O'BRIANT, Appellant

By: _____
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CERTIFICATE OF SERVICE

I, Jeffrey B. Rimes, Attorney for the Appellant, do hereby certify that I have this day mailed, by United States Mail, postage prepaid, a true and correct copy of the **Reply Brief of the Appellant** to the following:

Melissa A. Malouf
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501 E. Capitol Street
Jackson, MS 39201-2704

Honorable Cynthia Brewer
Madison County Chancery Court
P.O. Box 404
Canton, Mississippi 39181

This the 21st day of February, 2012.

Jeffrey B. Rimes

ADDENDUM

Mississippi Rules of Appellate Procedure 28(a)(6)

(a)(6) Argument. The argument shall contain the contentions of appellant with respect to the issues presented, and the reasons for those contentions, with citations to the authorities, statutes, and parts of the record relied on.

Mississippi Rules of Civil Procedure 59

(a) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of Mississippi; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the court of Mississippi.

On a motion for a new trial in an action without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

(b) Time for Motion. A motion for a new trial shall be filed not later than ten days after the entry of judgment.

(c) Time for Serving Affidavits. When a motion for new trial is based upon affidavits they shall be filed with the motion. The opposing party has ten days after service to file opposing affidavits, which period may be extended for up to twenty days either by the court for good cause shown or by the parties' written stipulation. The court may permit reply affidavits.

(d) On Initiative of Court. Not later than ten days after entry of judgment the court may on its own initiative order a new trial for any reason for which it might have granted a new trial on motion of a party. After giving the parties notice and an opportunity to be heard on the matter, the court may grant a timely motion for a new trial for a reason not stated in the motion. In either case, the court shall specify in the order the grounds therefor.

(e) Motion to Alter or Amend a Judgment. A motion to alter or amend the judgment shall be filed not later than ten days after entry of the judgment.